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Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

 In the Matter of)

 Amendment of Section 73.606(b),)
 Table of Allotments,)
 Television Broadcast Stations.)
 (Opelika and Phenix City, Alabama))

 Amendment of Section 73.622(b),)
 DTV Table of Allotments,)
 DTV Broadcast Stations.)
 (Opelika and Phenix City, Alabama))

 MM Docket No. 99-____
 RM-____

To: The Chief, Allocations Branch,
 Policy and Rules Division,
 Mass Media Bureau

PETITION FOR RULE MAKING

PAPPAS TELECASTING OF OPELIKA,
 A CALIFORNIA LIMITED PARTNERSHIP

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SUMMARY

Pappas Telecasting of Opelika, a California Limited Partnership ("Petitioner"), holds a license to operate television station WSWs (TV) on Analog Channel 66 in Opelika, Alabama (the "Station"). The Station has been assigned a paired digital television ("DTV") channel allotment on Channel 31. Petitioner herein asks the Commission to amend the Analog and DTV Tables of Allotments in order to delete the allotments of Analog Channel 66 and DTV Channel 31 to Opelika, allot those channels to Phenix City, Alabama, and modify Petitioner's license for the Station to reflect a change in the Station's city of license from Opelika to Phenix City.

The proposed new allotments to Phenix City would be mutually exclusive with the current co-channel allotments to Opelika. The removal of the allotments from Opelika to Phenix City would result in a preferential arrangement of allotments. Although the proposed change would remove Opelika's sole existing local television transmission service, the change would nonetheless serve the public interest because it would promote the survival of the Station by permitting Petitioner to relocate the Station's transmitting facilities to a site that is far superior to the Station's current transmitter site and other available sites from which the Station could continue to serve Opelika as the Station's city of license. At the proposed new transmitter site, the Station's coverage and operations, and its financial viability, would be greatly enhanced. This is especially important because the Station has never operated at a profit. To the contrary, prior owners of the Station who operated it on shoestring budgets nonetheless suffered financial losses (in one recent instance requiring that the Station be foreclosed upon by a secured lender). Notwithstanding Petitioner's

substantial investments in capital improvements, programming, and promotion, the Station continues to record substantial losses. Unless the Station can improve its financial viability, Opelika may lose its sole local television transmission service due to financial ruin rather than due to the removal of its channel allotments to Phenix City.

A second analog channel, which is currently vacant but for which there is at least one pending application to the Commission for a construction permit to build a new television station to serve Opelika, will continue to be allotted to Opelika and will be available to provide Opelika with a local television transmission service. Moreover, even as a Phenix City station, the Station would continue to provide a signal of Grade A quality to virtually all of Opelika from the Station's proposed new transmitter site. Notwithstanding the change in the Station's city of license, Petitioner will maintain a local studio facility in Opelika, with program origination capability, that will enable the Station to continue to address the local programming needs of Opelika.

Because the proposed change in the Station's city of license represents a move from one Urbanized Area to another (though within the same Designated Market Area), the *Huntington* doctrine, as construed by *Faye and Richard Tuck*, is not applicable. If *Tuck* were to be applied, however, the Commission would find that Phenix City is independent of the Columbus, Georgia metropolitan area within which it is located and is therefore entitled to its own local television transmission outlet, irrespective of the service provided by television stations licensed to Columbus.

Before the
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In the Matter of

**Amendment of Section 73.606(b),
Table of Allotments,
Television Broadcast Stations.
(Opelika and Phenix City, Alabama)**

**Amendment of Section 73.622(b),
DTV Table of Allotments,
DTV Broadcast Stations.
(Opelika and Phenix City, Alabama)**

**MM Docket No. 99-____
RM-____**

**To: The Chief, Allocations Branch,
Policy and Rules Division,
Mass Media Bureau**

PETITION FOR RULE MAKING

Pappas Telecasting of Opelika, a California Limited Partnership ("Petitioner"), the licensee of primary UHF commercial television broadcasting station WSWs (TV), operating on Analog Channel 66 in Opelika, Alabama (the "Station"), by counsel and in accordance with Section 1.420(i) of the Commission's Rules, hereby respectfully petitions the Commission to initiate a rule making proceeding for the purpose of amending the Table of Allotments for analog television broadcasting station channels, 47 C.F.R. § 73.606(b) (the "Analog Table"), and the Table of Allotments for digital television broadcasting ("DTV") station channels, 47 C.F.R. § 73.622(b) (the "DTV Table," and together with the Analog Table, the "Tables"). Specifically,

Petitioner requests the Commission to issue for public comment a *Notice of Proposed Rule Making* that will propose to amend the Tables by (i) deleting the present allotment of Channel 66 in the Analog Table to Opelika, Alabama, (ii) allotting Channel 66 in the Analog Table to Phenix City, Alabama, (iii) deleting the present allotment of Channel 31 in the DTV Table to Opelika, Alabama, (iv) allotting Channel 31 in the DTV Table to Phenix City, Alabama, and (v) modifying Petitioner's license from the Commission for the Station in order to specify Phenix City -- in lieu of Opelika -- as the Station's city of license.

I. THE PROPOSED NEW ALLOTMENT WOULD BE MUTUALLY EXCLUSIVE WITH THE CURRENT ALLOTMENT

Petitioner's proposal complies with the requirements of Section 1.420(i) of the Commission's Rules in that the proposed allotment of Analog Channel 66 to Phenix City would be mutually exclusive with retention of the current allotment of the channel to Opelika.^{1/}

^{1/} See Appendix A to this Petition for Rule Making, the Engineering Statement of Neil M. Smith of the firm of Smith and Fisher in Washington, D.C., Petitioner's broadcast engineering consultant, dated September 1, 1999 (the "Engineering Statement"). Section 73.610(b) of the Commission's Rules requires a separation of at least 280.8 kilometers between co-channel television broadcasting station channel allotments in Zone II for Channels 14-69. As shown in the Engineering Statement, the actual separation between the channel allotment reference points for Opelika and Phenix City is only 41.3 kilometers.

II. THE PROPOSED CHANGE IN ALLOTMENTS WOULD RESULT IN A PREFERENTIAL ARRANGEMENT OF ALLOTMENTS

The Commission will adopt a proposal to amend the Tables pursuant to Section 1.420(i) of the Commission's Rules "[i]f adoption of the proposed allotment plan would result in a net service benefit for the communities involved (that is, if the plan would result in a preferential arrangement of allotments)," *Report and Order in MM Docket No. 88-526, Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870, 4873 (1989) (the "*New Community of License Report and Order*"), *reconsideration granted in part and denied in part*, 5 FCC Rcd 7094 (1990). The Commission determines whether a proposed allotment would result in a preferential arrangement of allotments by applying the relevant allotment priorities. *Id.* The television broadcast station channel allotment priorities are: (1) to provide at least one television service to all parts of the United States; (2) to provide each community with at least one television broadcast station; (3) to provide a choice of at least two television services to all parts of the United States; (4) to provide each community with at least two television broadcast stations; and (5) to assign any remaining channels to communities based on population, geographic location, and the number of television services available to the community from stations located in other communities. *Sixth Report and Order in Docket Nos. 8735 and 8975, Amendment of Section 3.606 of the Commission's Rules and Regulations*, 41 FCC 148, 167 (1952).

The amendments to the Tables proposed by Petitioner in this proceeding will not implicate the first priority, because the Station currently provides, and -- following

implementation of the proposed changes in the Tables and the associated relocation of the Station's transmitting facilities ^{2/} -- will continue to provide, reception service to areas and populations that are and that would continue to be served by at least four other television stations. ^{3/}

The proposed change will clearly result in a preferential arrangement of allotments under the second priority, because Opelika currently has two analog television broadcasting station channels allotted to it -- Channels 50 and 66 -- while Phenix City has no television channel allotted to it. ^{4/} In addition, the population of Opelika according to the 1990 U.S. Census was 22,122 persons, while Phenix City's 1990 U.S. Census Bureau population count was 25,312 persons. Thus, Opelika -- the less populous of the two communities -- has two allotted analog channels, while Phenix City -- the more populous of the two communities -- currently has no allotted analog channel. Removing the Analog Channel 66 allotment from Opelika to Phenix City

^{2/} A discussion of the proposed relocation of the Station's transmitting facilities is found in Section III, Part 1 of this Petition for Rule Making, *infra*.

^{3/} See the Engineering Statement in Appendix A.

^{4/} According to Petitioner's research, there is no outstanding authorization for a television station to operate on Channel 50 in Opelika. However, there is at least one pending application to the Commission for such an authorization. On September 20, 1996, an application was filed with the Commission on behalf of United Television, Inc. ("United") that requests a construction permit from the Commission that would authorize United to construct a new primary analog UHF commercial television broadcasting station on Analog Channel 50 in Opelika. Petitioner has been unable to confirm the present status of United's application and the possible existence of other, mutually-exclusive applications.

In 1985, L. Lynn Henley applied for a construction permit to build a new primary analog UHF commercial television broadcast station that would have operated on Analog Channel 50 in Opelika (see File No. BPCT-850822KE). The application was dismissed by the Commission on October 30, 1986.

would provide the larger community with its first local television transmission service, without depriving the smaller community of an opportunity for a local television transmission service on allotted-but-currently-vacant-and-applied-for Analog Channel 50. Moreover, as noted in the Engineering Statement in Appendix A, virtually all (96%) of Opelika will continue to receive a signal of so-called "Grade A" field intensity (*i.e.*, 74 dBu) or better from the Station, operating as Phenix City station from the Station's proposed new transmitter site; and, as set forth below, Petitioner will maintain a studio facility in Opelika which will be capable of local program origination to continue to serve the local television programming needs of Opelika.

III. THE COMMISSION'S POLICY AGAINST MAKING A CHANGE IN ALLOTMENTS WHICH WOULD RESULT IN DEPRIVING A COMMUNITY OF ITS ONLY EXISTING TRANSMISSION SERVICE SHOULD BE WAIVED IN THIS CASE

Generally speaking, the Commission will not allow a station to change the community to which its channel is allotted if the effect would be to deprive the station's incumbent community of license of an existing service representing that community's only local transmission service. *New Community of License Report and Order, supra*, 4 FCC Rcd 4870, 4874. However, the Commission will waive that policy where the change would serve the public interest. *Memorandum Opinion and Order on Reconsideration in MM Docket No. 88-526, Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd 7094, 7096-97 (1990) (the "*New Community of License Memorandum Opinion and Order*"). Although a grant of Petitioner's request for relief in this proceeding would remove Opelika's only existing local television transmission service, as explained below it also would serve the public

interest. The Commission should therefore grant a waiver of its general policy, based upon the unique facts and circumstances presented by the instant case.

1. The Proposed Change to the Station's Community of License is Motivated by the Need to Relocate the Station's Antenna Site in Order to Make the Station Economically Viable.

Petitioner acquired the Station in 1996 from Genesis Broadcasting Company, Inc. ("Genesis"), which had acquired the Station's assets as a result of a foreclosure against the previous licensee, Christian Television of Alabama ("CTA"). CTA had purchased the station from R.C.H. Broadcasting, Inc. ("R.C.H."), a commonly-controlled affiliate of Genesis, and in consideration of the sale of the Station's assets by R.C.H. to CTA, CTA had given R.C.H. a promissory note for a portion of the purchase price. Notwithstanding the facts that CTA operated the Station as a religious station on an extremely low monthly overhead, CTA was unable to realize a profit from the Station's operations, and in fact the Station's losses were so severe that CTA defaulted in its promissory note payments to R.C.H. Thereupon, R.C.H. caused its affiliate Genesis to foreclose on its security attaching to the Station's assets, and Genesis acquired those assets from CTA. However, even during the operation of the Station by R.C.H. and Genesis, which were also low-overhead operations, the Station was financially unsuccessful.

Petitioner acquired the Station from Genesis in 1996 for approximately \$1.6 million. Since that time, Petitioner has invested \$958,000 in capital improvements in the Station's facilities. These improvements include the purchase and installation of a

new transmitter; refurbishing the Station's antenna and RF system and the antenna support tower; overhauling the Station's auxiliary microwave system; replacing and upgrading the Station's electrical power service; upgrading the transmitter building; installing a security system at the transmitter site; improvements to the studio master control switching equipment; replacing all program record/playback VCRs; adding two satellite systems; adding a mobile production unit; and adding an office computer network.

Petitioner has also significantly improved the Station's programming and promotion. Prior to Petitioner's tenure as the licensee of the Station, there was absolutely no budget for promoting the Station or its programming. In fact, under previous licensees the total monthly overhead for operating the Station was between \$10,000 and \$15,000. As of May 31, 1999, Petitioner had spent nearly \$30,000 this year on promotion alone. Petitioner has improved the salary structure of the Station's personnel, replacing staff and adding positions in order to professionalize the Station's human resources. Petitioner has also substantially improved the Station's programming. Through May 31 of this year, the Station's combined expenditures for programming and film exhibition rights was over \$92,000 on a year-to-date basis. Moreover, Petitioner is committed to continuing to improve the Station's programming service to the public of Opelika; this month the Station will become an affiliate of the United Paramount Network ("UPN").

Notwithstanding the foregoing investments and improvements to the Station's facilities and operations that Petitioner has made over the past three years, the Station

continues to lose substantial amounts of money. In 1996, Petitioner incurred an accumulated earnings deficit of \$326,000 for the five-and-one-half months that Petitioner operated the Station. In 1997, the accumulated earnings deficient ballooned to \$1,851,000. The full-year net loss in 1997 was \$1,525,000, and that figure grew to \$1,737,000 in 1998. For the first five months of 1999, the negative cash flow of the Station (before accounting for depreciation) was \$756,000.

Absent a change in the Station's circumstances, there is no realistic prospect of the Station operating at a profit with its current facilities in the foreseeable future. The harsh fact is that the Station's signal is simply not receivable over significant portions of its market. The Station is licensed to serve the Columbus, Georgia Designated Market Area ("DMA"), ranked as the 128th DMA in the country. From the Station's current transmitter site, the Station's signal arrives at many homes within the DMA from the northwest; however, many of those homes have oriented their rooftop antennas or their set-top antennas ("rabbit ears") to the southwest, which is the direction from which the signals of several television stations in the DMA arrive at those homes, including the signals of popular stations such as Spartan Broadcasting, Inc.'s CBS-affiliated Station WRBL (TV), Channel 3, Columbus, Georgia, and Raycom U.S. Inc.'s ABC-affiliated Station WTVM (TV), Channel 9, Columbus Georgia. Thus, the Station faces the handicap that significant portions of its potential audience have oriented their receiving antennas in exactly the opposite direction from the direction in which reception of the Station's signal would be optimized.

Likewise, due to inadequate signal strength at the cable systems' headends, many cable systems in the DMA do not carry the Station's signal. These include the Blackstone Cable systems serving Pierce County, Cobb, Leslie, and Plains, Georgia, the Andersonville Cable system serving Andersonville, Georgia, the Flint Cable TV system serving Buena Vista, Butler, and Reynolds, Georgia, the Comcast Cable system serving Clayton, Alabama, the InterMedia Cable system serving Cuthbert, Georgia, the Manchester Cablevision system serving Cusseta, Georgia, the Southern Cablevision system serving Preston, Georgia, the TCI of Georgia cable system serving Americus, Georgia, the Teleview cable system serving Cobb, Georgia, and the Time Warner cable system serving Clio, Alabama. Cumulatively, these systems serve over 13,500 subscribers in the Station's DMA who do not receive the Station's signal in their cable systems' channel line-ups.

These limitations on the ability of the Station's signal to reach its potential audience in the DMA create "vicious cycles" which contribute to the Station's lack of profitability and lack of prospective profitability in the future. Because of these limitations, the Station is frequently marginalized. The local television program viewing guides frequently make no mention of the Station at all. Similarly, program syndicators have in the past refused to sell program exhibition rights to the Station for their programs, on the grounds that the potential audience of the Station is insufficient and that the Station's coverage and reception is inadequate.

In order to help make the Station economically viable, Petitioner negotiated an agreement that would enable Petitioner to lease space for the Station's antenna and

other transmitting facilities at an existing tower site near Cusseta, Georgia at a rental rate that is very favorable. This is the same site from which WRBL (TV) and WTVM (TV) operate, and thus the Station would enjoy the benefits of the orientation of home antennas in the direction of WRBL (TV) and WTVM (TV) that is prevalent in many portions of the DMA. In addition to the below-market rent, broadcasting from the Cusseta site would also enable the Station to provide approximately 688,700 viewers with television reception service of so-called "Grade B" field intensity (64 dBu) or better, as opposed to the approximately 485,000 viewers who currently receive such service from the Station,^{5/} and would thereby make the Station more attractive to advertisers and enable Petitioner to enhance the Station's revenue performance.^{6/} Moreover, Petitioner could realize a near-term cash infusion for the Station by either selling the Station's existing tower, which Petitioner owns, or by leasing space on the existing tower to telecommunications service providers. All of those factors would combine to improve the Station's chances of being able to achieve profitability and to avoid failing financially, it being recognized that without some alteration in the Station's current and projected economic trajectory, the demise of the Station is a certainty. Were the Station to fail economically, Opelika would be deprived thereby of

^{5/} See the Engineering Statement in Appendix A.

^{6/} The increase in the population residing within the Station's predicted Grade B field-intensity signal contour does not tell the whole story, however, since (as indicated earlier) substantial numbers of persons residing within the Station's current predicted Grade B contour are in fact unable to receive the Station's signal, due to the orientation of their outdoor or indoor receiving antennas. Operating as a Phenix City station from the proposed new transmitter site in Cusseta, the Station will actually improve the level of signal strength provided to substantial numbers of viewers and potential viewers who are currently predicted, under the Commission's methodology, to receive the Station's signal at Grade B or higher quality but who in fact do not do so because of the orientation of their antennas away from the Station's current transmitter site.

its sole local television transmission service in a manner not contemplated in the *New Community of License Report and Order* or the *New Community of License Memorandum Opinion and Order* and not within the control of Petitioner or the Commission.

In June of 1996 -- more than three years ago -- Petitioner applied to the Commission for a construction permit to relocate the Station's facilities to the antenna tower site in Cusseta (File No. BPCT-960626KH). Petitioner initially had no intention of changing the Station's community of license in connection with the proposed relocation of the Station's facilities. During the process of preparing that application, however, Petitioner became aware that it was not possible to cover the entire city of Opelika with a so-called "City-Grade" field-intensity signal (80 dBu), as required by Section 73.685(a) of the Commission's Rules, from the proposed new antenna site. Petitioner filed the application with a request for a waiver of the requirements of Section 73.685(a) of the Rules.^{7/} It has become clear, however, in the intervening three-year period that the application has been pending before the Commission that the waiver request has little chance of success. As an alternative to the further prosecution of the Section 73.685(a) waiver request in the pending application in File No. BPCT-960626KH, Petitioner has determined to attempt to change the Station's community of license to Phenix City. The Station will cover all of Phenix City with a City-Grade signal from the proposed new antenna site near Cusseta, and will cover virtually all of

^{7/} As shown in the Engineering Statement, operation of the Station in accordance with the proposal in the application in File No. BPCT-960626KH would comply with all pertinent rules of the Commission, provided that Analog Channel 66 were allotted to Phenix City.

Opelika with a signal having a predicted field intensity of Grade A or better. *See the Engineering Statement in Appendix A.*

2. The Proposed Change in the Station's Community of License is not an Attempt to Manipulate the Commission's Policies.

In the *New Community of License Memorandum Opinion and Order*, the Commission addressed requests for waiver of the general policy against removing a community's sole local transmission service in a case in which a licensee seeks to remove a channel allotment from a smaller community to a suburban community which has no local transmission service but which is part of an urbanized area that includes other communities having local transmission services. The Commission stated that, while such a change might result in a preferential arrangement of allotments because of the suburban community's larger population and lack of a local transmission service, the Commission would not waive its general policy where such a waiver ". . . would appear to condone an artificial and unwarranted manipulation of the Commission's policies," *New Community of License Memorandum Opinion and Order, supra*, 5 FCC Rcd 7094, 7097.

No such manipulation exists in this case. First, the proposed change in the Station's community of license is motivated by the vital need to relocate the Station's transmitting facilities so as to enable the Station to take advantage of a very favorable leasing arrangement for an antenna site yielding far superior coverage in comparison with the Station's current site, not by a desire to manipulate the Tables in order to relocate the Station to a larger market. In fact, the Station's predicted City-Grade field-

intensity signal contour from its present transmitter site already covers Columbus, Georgia and Phenix City, Alabama, thus belying any suggestion that the proposed change in the community to which Analog Channel 66 is allotted is motivated by a desire to extend the Station's coverage over a larger nearby community for the first time. *See* the Engineering Statement in Appendix A. In addition, both Opelika and Phenix City are located in the Columbus, Georgia DMA, so Petitioner is not seeking to change its basic advertising market or to move to a larger and more lucrative market.

Second, the very survival of the Station depends upon the proposed transmitter site change, which will be possible only if the Station's community of license is changed to Phenix City. As shown, such a change will permit Petitioner to take advantage of an available transmitter site which will vastly improve the Station's ability to reach its present potential audience and the remaining audience in the DMA, through improved reception by directionally-oriented home rooftop and set-top antennas and through improved cable television system carriage of the Station's signal. That, in turn, will help to ensure the survival of the Station as a source of UPN programming and other high-quality programming for all consumers within the DMA, including the residents of Opelika.^{8/} Third, although Phenix City is located near Columbus, Phenix

^{8/} The Station is currently broadcasting between 1,000 and 1,500 public service announcements ("PSAs") per month, which carry an aggregate advertising value of between \$10,000 and \$30,000. These PSAs benefit hundreds of civic and charitable organizations. The Station also supports several local organizations by presenting both live and tape-delayed coverage of Humane Society events, food collection drives on the campus of Auburn University, the United Way, and the local Chamber of Commerce, to name just a few. The Station regularly conducts "community spotlight" interviews with local residents and community leaders, in order to focus viewer attention on local issues of concern. In
(continued...)

City (in the State of Alabama) is not a mere suburban adjunct of Columbus (in the State of Georgia), but is a separate and independent community deserving of its own local transmission service irrespective of the local transmission services currently present in Columbus. See Section IV, Part 2, *infra*.

This case, in fact, is quite similar to the case of *Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations (Ardmore, Oklahoma and Sherman, Texas)*, 7 FCC Rcd 4846 (1992), in which the Commission amended the Analog Table to permit Station KXII (TV) to change its community of license from Ardmore, Oklahoma to Sherman, Texas, despite the fact that Station KXII (TV) constituted Ardmore's sole local transmission service. As is the case with the Station, the principal motivation for changing the community to which Station KXII (TV)'s channel was allotted was to promote the station's economic survival. *Ardmore and Sherman*, 7 FCC Rcd 4846, 4847. ^{2/}

8/(...continued)

conjunction with the American Red Cross, the Station recently concluded a blood donation drive at the Station's offices and studios in Opelika. Within the past month, the Station provided on-location coverage of a Health Fair sponsored by the East Alabama Medical Center in Opelika. All of this programming is produced and broadcast by the Station, notwithstanding the fact that the costs of same exacerbate the Station's already-bleak financial performance.

9/ The only significant distinction between the Station's situation and the *Ardmore and Sherman* case is that no change in Station KXII (TV)'s transmitter site was proposed. However, that fact was deemed relevant only to the extent that following the change in its community of license, Station KXII (TV) would continue to provide reception service to Ardmore. *Ardmore and Sherman* at 4847. Similarly, following relocation of its transmission facilities to the proposed new antenna tower site in Cusseta, the Station will continue to put a
(continued...)

IV. ANALYSIS UNDER *FAYE & RICHARD TUCK, INC.*

1. A *Tuck* Showing Should not be Required in this Case

In the *New Community of License Memorandum Opinion and Order*, the Commission indicated that it was concerned about a mechanical application of the priority for first local service that “. . . would appear to allow an artificial or purely technical manipulation of the Commission’s 307(b) related policies.” *New Community of License Memorandum Opinion and Order, supra*, 5 FCC Rcd 7094, 7096. To address this concern, the Commission has applied the so-called *Huntington* doctrine,^{10/} as construed by the Commission in *Faye & Richard Tuck, Inc.*, 3 FCC Rcd 5374 (1988), to cases in which a broadcast station sought to change its community of license from a city outside of an Urbanized Area to a city within an Urbanized Area.

However, the Commission has not applied the *Tuck* analysis where the removal of a station’s channel allotment was from one community to another within a single Urbanized Area, *Amendment of Section 73.202(b), Table of Allotments, FM*

9/(...continued)

predicted Grade A signal over nearly all of Opelika. See the Engineering Statement in Appendix A. Moreover, as in *Ardmore and Sherman, supra*, Petitioner will commit to the Commission that the Station will maintain a studio facility in Opelika that will be capable of local program origination. *Id.* (“The probability that K-Twelve [the petitioner in *Ardmore and Sherman*] will continue to operate a studio in Ardmore [the community from which the channel allotment in question would be removed] further reduces any adverse effect that this change in community would have on Ardmore residents”).

^{10/} *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C. Cir. 1951).

Broadcast Stations (East Los Angeles, Long Beach, and Frazier Park, California), 10 FCC Rcd 2864, 2868-69 (Chief, Allocations Branch, 1995), or from one Urbanized Area to another, where the affected station's City-Grade field-intensity signal contour currently covers the community to which the station's channel would be re-allotted, *Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations (San Bernardino and Long Beach, California)*, 13 FCC Rcd 2309, 2310 (Chief, Allocations Branch, 1998). No issue exists in such cases as to whether the petitioner is attempting to manipulate the Tables in order to move a station into an Urbanized Area, because the station is already located in an Urbanized Area.

The proposed change in community of license for the Station presents a case in which the Station seeks to change its community of license from one Urbanized Area to another. The City of Opelika, Alabama -- the Station's current community of license -- is located in the Auburn-Opelika Urbanized Area. The City of Phenix City, Alabama -- the Station's proposed new community of license -- is located in the Columbus Urbanized Area. In addition, as noted in Section III, Part 2, *supra*, the Station currently provides City-Grade service to Columbus and to Phenix City. *See San Bernardino and Long Beach, California, supra*, 13 FCC Rcd 2309, 2310 (where station currently provides City-Grade service to community to which station's channel would be re-allotted, *Tuck* analysis not required). Consequently, the *Tuck* analysis should not be applied in this case.

2. Even if the *Tuck* Analysis is Applied, the *Huntington* Doctrine Should not be Invoked in this Case.

If the Commission were to apply the *Tuck* analysis in this case, the Commission would determine whether the *Huntington* doctrine should be invoked. In analyzing a case under the *Huntington* doctrine, the Commission looks at three factors: (1) the size and proximity of the proposed community of license to the central city of the Urbanized Area, (2) the signal population coverage of the station, and (3) the independence or interdependence of the proposed community to the central city of the Urbanized Area. *Tuck, supra*, 3 FCC Rcd 5374, 5377.

With respect to the first criterion, the proposed community of license for the Station -- Phenix City, Alabama -- has a population of 25,312 (according to the 1990 U.S. Census) and is located one mile away from Columbus, Georgia, the central city of the Urbanized Area, which has a population of 178,681. While such numbers at first blush might suggest that Phenix City is both considerably smaller than Columbus, and is geographically proximate to Columbus, it is important to note that with a population of over 25,000 persons, Phenix City is a significant city in its own right. Moreover, the distance between Phenix City and Columbus is a full mile and the two cities are separated by the Chattahoochee River and are situated in different States.

With respect to the second criterion, the Station's signal population coverage, although the Station would cover Columbus with a predicted City-Grade signal following the proposed change in the Station's transmitter site, the Station already covers Columbus with a City-Grade signal from its current location. Hence, this is not

a case where a petitioner desires to move its station to a suburb of a larger city in order to enable the station to extend its service to the residents of that city for the first time. In this case, the Station already provides service to the populace of Columbus. Petitioner's desire to change the Station's community of license, as noted above, is motivated simply by the need to take advantage of an opportunity to locate the Station's antenna on an existing tower that will afford superior coverage at a below-market rental and from which the entire DMA's television viewing public can genuinely receive a viewable signal by virtue of improved antenna orientation and total-market cable carriage.

The third criterion, the extent to which the proposed community is independent of the central city of the Urbanized Area, is the most important of the three *Tuck* criteria and, along with the criterion of size and proximity to the central city, is ". . . generally decisive in determining whether the *Huntington* doctrine should apply." *Tuck, supra*, 3 FCC Rcd 5374, 5377-78. In assessing the level of independence of Phenix City from Columbus, the Commission is required to review eight factors, *Tuck, supra*, 3 FCC Rcd 5374, 5378. As is demonstrated below, an analysis of those eight factors clearly indicates that Phenix City is independent of Columbus:

- (1) The extent to which Phenix City residents work in Columbus rather than in Phenix City. Despite attempts to obtain definitive statistical information on this factor, Petitioner has been unable to do so. Apparently, there are no statistics that track the workplaces of citizens of Phenix City. However, as noted in Item (6) below, there are a number of significant employers in

Phenix City, and it is reasonable to assume that a large number of Phenix City residents work in Phenix City.

- (2) Whether Phenix City has its own newspaper or other media that cover the community's local needs and interests. The *Phenix Citizen* is a newspaper published weekly in Phenix City. There are also two radio stations, WPNX (AM) and WGSY (FM), licensed to Phenix City. Phenix Cable, the local cable television service provider, provides a daily five-minute newscast at the top of each hour, and also carries a 30-minute nightly program which covers, among other things, City and County Commission meetings for Phenix City and Russell County, Alabama (of which Phenix City comprises a part). ^{11/}
- (3) Whether community leaders and residents perceive Phenix City as being an integral part of, or separate from, the larger metropolitan area. Mr. Victor Cross, President of the Phenix City Chamber of Commerce, has informed Mr. Gerry Potter, the Station's General Manager, that Phenix City is able to function as an independent city, regardless of its proximity to Columbus. See Mr. Potter's Declaration, appended to this Petition for Rule Making as Appendix B.

^{11/} In that connection, it is worth mentioning here that the Phenix City Little League Baseball All-Star team recently competed for the Little League Baseball World Series Championship in Williamsport, Pennsylvania against a Little League team from Japan. Over 7,000 Little League teams had competed in the tournament. The Phenix City team had won the United States Little League Championship and received considerable local, regional, and national publicity, including coverage of the Phenix City's team's return home after the tournament by the Station and by other local media.

- (4) Whether Phenix City has its own local government and elected officials.

Phenix City has its own Mayor and City Council and its own School Board.

Phenix City is the county seat of Russell County, Alabama.

- (5) Whether Phenix City has its own telephone book provided by the local telephone company or zip code. The local telephone book is shared among

Columbus, Phenix City, and several other smaller communities. However, Columbus and Phenix City have separate post offices and zip codes.

- (6) Whether Phenix City has its own commercial establishments, health facilities, and transportation systems. A number of significant employers are located in

Phenix City. These include Mead Coated Board, Inc., a manufacturer of paper products which is headquartered in Phenix City and has approximately 1,300 employees; Fieldcrest Cannon, Inc., a manufacturer of towels, bedsheets, and other linens, which has approximately 650 employees; Boral Brick, a manufacturer of concrete and bricks; and Pillowtex, a manufacturer of potholders, handtowels, *etc.*, which has approximately 300 employees. In addition, Phenix City is the home of Phenix Regional Hospital, which has 300 beds, Troy State University at Phenix City, and Chattahoochee Valley Community College. Phenix City is served by the Phenix City Express (PEX) public transportation system, which offers fixed bus routes throughout Phenix City.

- (7) The extent to which Phenix City and Columbus are part of the same advertising market. No data could be located with respect to this factor. Petitioner concedes that, because of their geographic proximity, it is likely that Phenix City and Columbus are considered by many advertisers to be parts of the same advertising market. They are in the same DMA.
- (8) The extent to which Phenix City relies on Columbus for various municipal services, such as police, fire protection, schools, and libraries. Phenix City has its own police and fire departments, public school system, public utilities department, and Chamber of Commerce. Phenix City has an annual budget of approximately \$13.7 million.

Hence, with respect to five of the eight independence factors (Numbers 2, 3, 4, 6, and 8 discussed above), there is strong evidence of Phenix City's independence from Columbus. With respect to one of the factors (Number 5), the evidence is mixed in that Phenix City does not have its own telephone book, but does have its own post office and zip codes. With respect to one of the factors (Number 1), reliable information is not available, but the data on employers located in Phenix City and the size of their work forces support an assumption that at least significant numbers of Phenix City residents work in the community where they live, and thus Phenix City residents are not necessarily dependent upon Columbus for their jobs. Only with respect to one of the eight factors (Number 7) is there no empirical or other basis on which to establish Phenix City's independence from the Columbus Urbanized Area. Taken as a whole, an analysis of the eight factors under the

independence/interdependence criterion weighs strongly in favor of a finding that Phenix City is independent of Columbus. *See Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Parker and Port St. Joe, Florida)*, 11 FCC Rcd 1095, 1096 (Chief, Allocations Branch, 1996) (community to which station's channel would be re-allotted was found to be independent of Urbanized Area in which it was located, where majority of the eight *Tuck* factors supported finding of independence).

CONCLUSION

The removal of Analog Channel 66 and DTV Channel 31 from Opelika to Phenix City, and the concomitant modification of Petitioner's license from the Commission for the Station, would be entirely consonant with Section 1.420(i) of the Commission's Rules, inasmuch as the proposed new allotments would be mutually exclusive with the current allotments of those channels and would result in a preferential arrangement of allotments. Although the change would result in the removal of Opelika's only existing local television transmission service, the change would nevertheless be in the public interest because it would make the Station financially viable and save the Station from failure. Absent some improvement in the Station's economic prospects, *i.e.*, the improvement in the Station's coverage at a favorable rental cost at the proposed new transmitter site near Cusseta, the Station faces financial ruin and Opelika will lose its only existing local television transmission service in that event for reasons that neither Petitioner nor the Commission can control, irrespective of the concerns expressed in the *New Community of License Report and Order* and the *New Community of License Memorandum Opinion and Order*. In

addition, as shown in the Engineering Statement in Appendix A, a portion of Opelika's area and population would continue to receive City-Grade service from the Station, virtually all of Opelika would continue to receive Grade A service from the Station, Opelika will continue to have an opportunity for a local television transmission service on Analog Channel 50, Petitioner will retain a local studio facility with local program origination capability in Opelika, and the more populous community of Phenix City will have its first and only local television transmission service. Given those circumstances, Petitioner submits that a waiver of the general prohibition against the removal of a community's sole existing local transmission service, as set forth in the *New Community of License Memorandum Opinion and Order*, has been justified.

To the extent that the Commission deems that an analysis under *Tuck* is appropriate in this case, Petitioner believes that it has adequately demonstrated the independence of Phenix City from the larger metropolitan area of which Columbus is the central city.

Petitioner hereby states its intention to apply for the Commission's authorization to modify Petitioner's license from the Commission for the Station, in order to change the Station's community of license to conform to the amendments to the Tables herein requested.

WHEREFORE, the foregoing having been duly considered, Petitioner respectfully urges the Commission to initiate a rule making proceeding in order to

amend the Tables as set forth below and to modify Petitioner's license for the Station accordingly:

Section 73.606 (b):

Channel No.

<u>City and State:</u>	<u>Present:</u>	<u>Proposed:</u>
Opelika, Alabama	50, 66	50
Phenix City, Alabama	-----	66

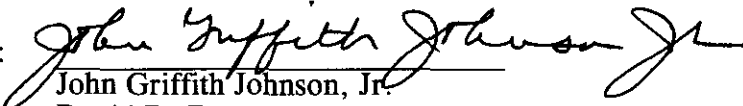
Section 73.622(b):

Channel No.

<u>City and State:</u>	<u>Current:</u>	<u>Proposed:</u>
Opelika, Alabama	31	----
Phenix City, Alabama	----	31

Respectfully submitted,

**PAPPAS TELECASTING OF OPELIKA,
A CALIFORNIA LIMITED PARTNERSHIP**

By: 
John Griffith Johnson, Jr.
David D. Burns
Heidi A. Gaffney
Its Attorneys

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Telephone: (202) 508-9500
Facsimile: (202) 508-9700

September 9, 1999

APPENDIX A

ENGINEERING STATEMENT

The engineering data contained herein have been prepared on behalf of PAPPAS TELECASTING OF OPELIKA, licensee of WSWs(TV), Channel 66, Opelika, Alabama, in support of its Petition for Rulemaking in which it is proposed to change the WSWs community of license to Phenix City, Alabama.

The reference coordinates for Phenix City are 32° 27' 48", 85° 00' 12", which are 41.3 kilometers (25.7 miles) from the Opelika reference coordinates. Since § 73.610(b) of the Rules requires a separation of 280.8 kilometers between co-channel UHF stations in Zone II, Channel 66 cannot be allotted to both Opelika and Phenix City. Attached as Figure 1 is a tabulation of spacings to pertinent co- and adjacent-channel allotments, based on the Phenix City reference coordinates. This clearly shows that the reference site complies with all NTSC spacing requirements and is sufficiently removed from all pertinent DTV allotments to assure an absence of interference.

There is now pending before the Commission an application specifying a relocation of the WSWs transmitter site to 32° 19' 25", 84° 46' 46" with 5000 kw at 443 meters. Figure 2 is a tabulation of spacings from this site. As indicated, as in Figure 1, no violations of spacing or interference criteria would exist for this site.

Figure 3 is a map which shows the city boundaries of Opelika and Phenix City, the proposed WSWs site, and portions of the proposed City Grade and Grade A service contours. As shown, WSWs would provide predicted City Grade service to all of Phenix City. With respect

to Opelika, WSWS would provide City Grade service to 5 percent of the community (1,081 persons, 1.6 square miles) but would provide Grade A service to 96 percent of Opelika (20,748 persons, 30.7 square miles) and Grade B service to the rest.

Thus, WSWS would continue to provide high-quality television service to Opelika from its proposed site.

Figure 4 shows the present and proposed Grade B Contours of WSWS. In addition, it shows the other television services available within the gain and loss areas. Figure 5 is a tabulation of the other television services available within the gain and loss areas, and Figure 6 is a tabulation of population and area data. There are portions of both the gain and loss areas that receive only four other services. All other portions of the gain and loss areas receive at least five other services.

Figure 7 shows the present and proposed service contours of WSWS. As indicated, the present WSWS City Grade Contour covers all of both Columbus and Phenix City.

I declare under penalty of perjury that the foregoing statements and the attached exhibits are true and correct to the best of my knowledge and belief.

A handwritten signature in black ink, appearing to be 'N. Smith', with a long horizontal stroke extending to the right.

NEIL M. SMITH

September 1, 1999

FIGURE 1

ALLOCATION STUDY
 PROPOSED CHANNEL 66
 PHENIX CITY, ALABAMA
 (AT PHENIX CITY REFERENCE POINT)

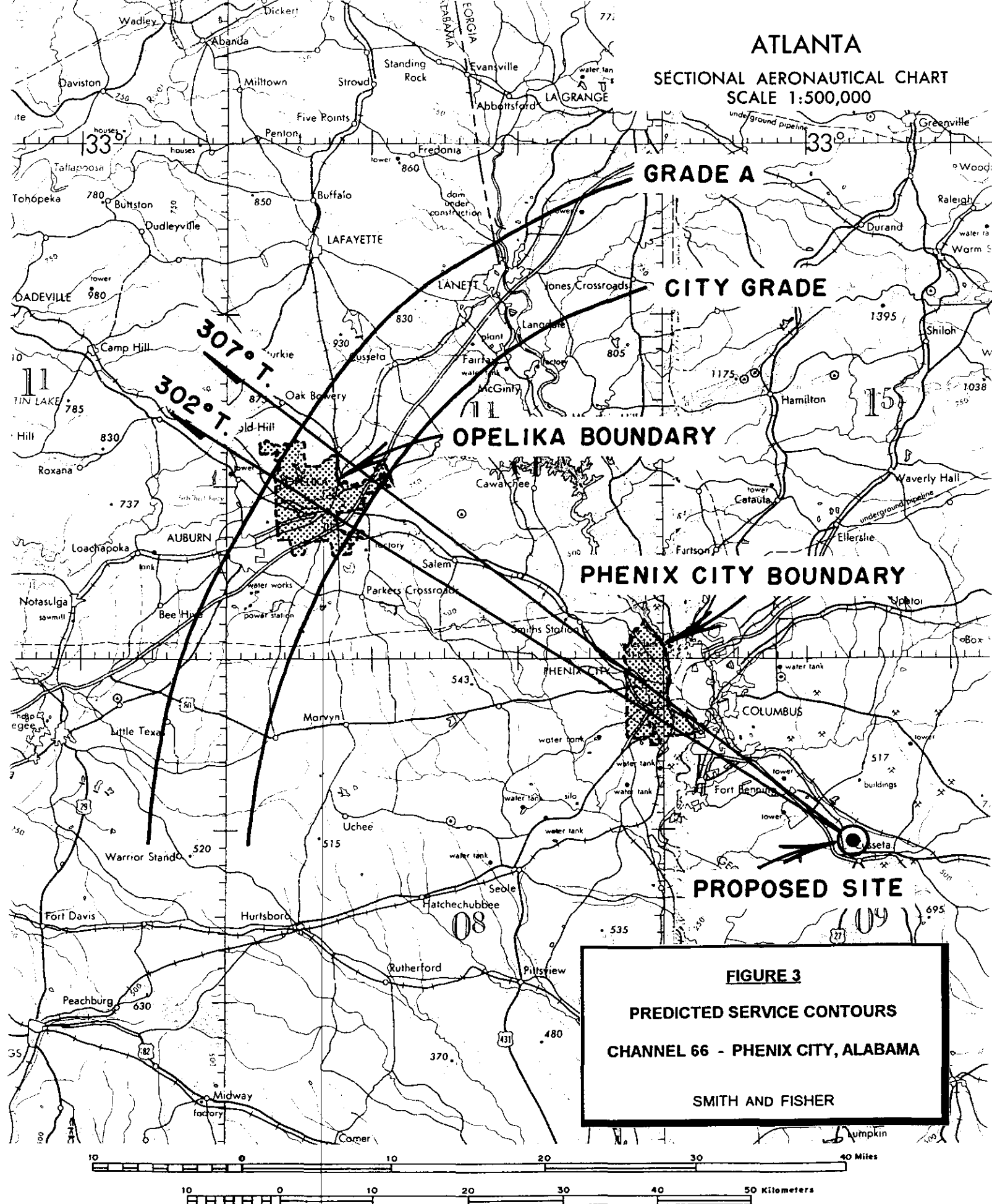
<u>Channel</u>	<u>Nearest Assignment</u>	<u>Type</u>	<u>Separation (km.)</u>		
			<u>Required</u>	<u>Proposed</u>	<u>Diff.</u>
51	WSST-TV, Cordele, GA	DTV	<24, >97	129.0	OK
52	Alloc., Albany, GA	NTSC	95.7	126.8	+31.1
58	WPGA-TV, Perry, GA	NTSC	31.4	139.2	+107.8
59	WDIQ, Dozier, AZ	DTV	<24, >97	165.4	OK
61	WDSI-TV, Chattanooga, TN	NTSC	31.4	305.6	+274.2
62	Alloc., Birmingham, AL	NTSC	31.4	205.3	+173.9
63	Alloc., Montgomery, AL	NTSC	31.4	123.1	+91.7
64	WGNM, Macon, GA	NTSC	31.4	139.1	+107.7
65	Alloc., Cedartown, GA	NTSC	87.7	173.5	+85.8
<u>66</u>	WJFB, Lebanon, TN	NTSC	280.8	428.4	+147.6
67	WRJM-TV, Troy, AL	NTSC	87.7	99.8	+12.1
68	WABM, Birmingham, AL	NTSC	31.4	205.1	+173.7
69	WUPA, Atlanta, GA	NTSC	31.4	154.7	+123.3

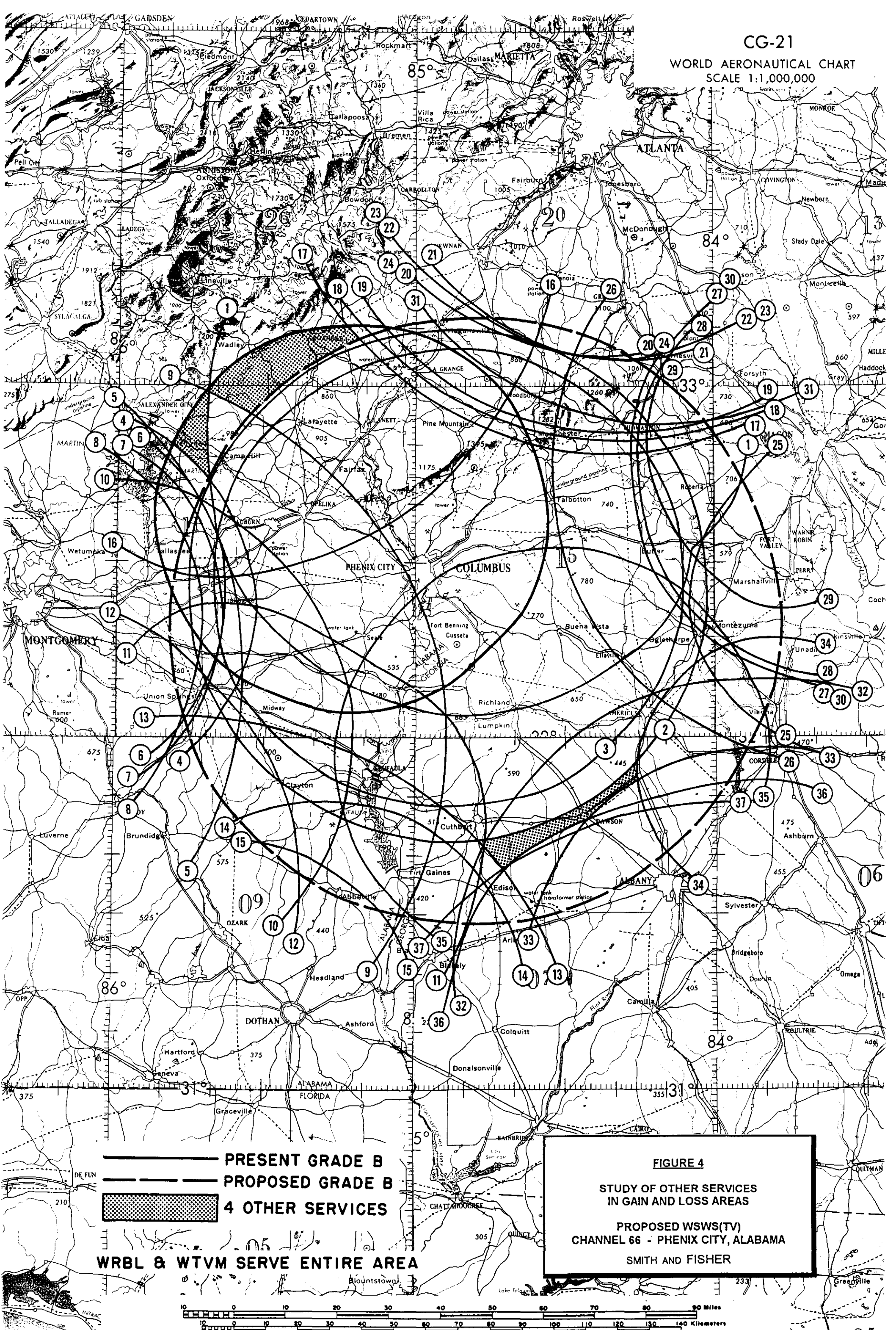
FIGURE 2

ALLOCATION STUDY
 PROPOSED CHANNEL 66
 PHENIX CITY, ALABAMA
 (AT PROPOSED TRANSMITTER SITE)

<u>Channel</u>	<u>Nearest Assignment</u>	<u>Type</u>	<u>Separation (km.)</u>		
			<u>Required</u>	<u>Proposed</u>	<u>Diff.</u>
51	WSST-TV, Cordele, GA	DTV	<24, >97	103.2	OK
52	Alloc., Albany, GA	NTSC	95.7	101.7	+6.0
58	WPGA-TV, Perry, GA	NTSC	31.4	124.0	+92.6
59	WDIQ, Dozier, AZ	DTV	<24, >97	174.6	OK
61	Appl., Gainesville, FL	NTSC	31.4	316.1	+284.7
62	Alloc., Birmingham, AL	NTSC	31.4	230.8	+199.4
63	Alloc., Montgomery, AL	NTSC	31.4	142.0	+110.6
64	WGNM, Macon, GA	NTSC	31.4	123.9	+92.5
65	Alloc., Cedartown, GA	NTSC	87.7	192.5	+104.8
<u>66</u>	Alloc., Forest City, NC	NTSC	280.8	429.8	+149.0
67	WRJM-TV, Troy, AL (Appl.)	NTSC	87.7	114.2	+26.5
68	WABM, Birmingham, AL	NTSC	31.4	231.1	+199.9
69	WUPA, Atlanta, GA	NTSC	31.4	163.7	+132.3

SECTIONAL AERONAUTICAL CHART
SCALE 1:500,000





— PRESENT GRADE B
- - - PROPOSED GRADE B
[Hatched Box] 4 OTHER SERVICES

WRBL & WTVM SERVE ENTIRE AREA

FIGURE 4
STUDY OF OTHER SERVICES
IN GAIN AND LOSS AREAS

PROPOSED WSWs(TV)
CHANNEL 66 - PHENIX CITY, ALABAMA
SMITH AND FISHER

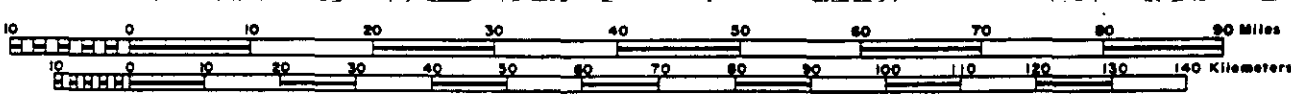


FIGURE 5

OTHER TELEVISION SERVICES
AVAILABLE IN GAIN AND LOSS AREAS

PROPOSED WSWS(TV)
CHANNEL 66 - PHENIX CITY, ALABAMA

<u>Map Number</u>	<u>Call</u>	<u>Community</u>	<u>Channel</u>
	WRBL	Columbus, GA	3
	WTVM	Columbus, GA	9
1	WJSP-TV	Columbus, GA	28
2	WLTZ	Columbus, GA	38
3	WXTX	Columbus, GA	54
4	WMCF-TV	Montgomery, AL	45
5	WAKA	Selma, AL	8
6	WAIQ	Montgomery, AL	26
7	WCOV-TV	Montgomery, AL	20
8	WHOA-TV	Montgomery, AL	32
9	WSFA	Montgomery, AL	12
10	WRJM-TV	Troy, AL	67
11	WGIQ	Louisville, AL	43
12	WDIQ	Dozier, AL	2
13	WTYV	Dothan, AL	4
14	WDHN	Dothan, AL	18
15	WDFX-TV	Ozark, AL	34
16	WCIQ	Mount Cheaha, AL	7
17	WSB-TV	Atlanta, GA	2
18	WAGA	Atlanta, GA	5
19	WXIA-TV	Atlanta, GA	11
20	WTBS	Atlanta, GA	17
21	WPBA	Atlanta, GA	30
22	WATL	Atlanta, GA	36
23	WGNX	Atlanta, GA	46

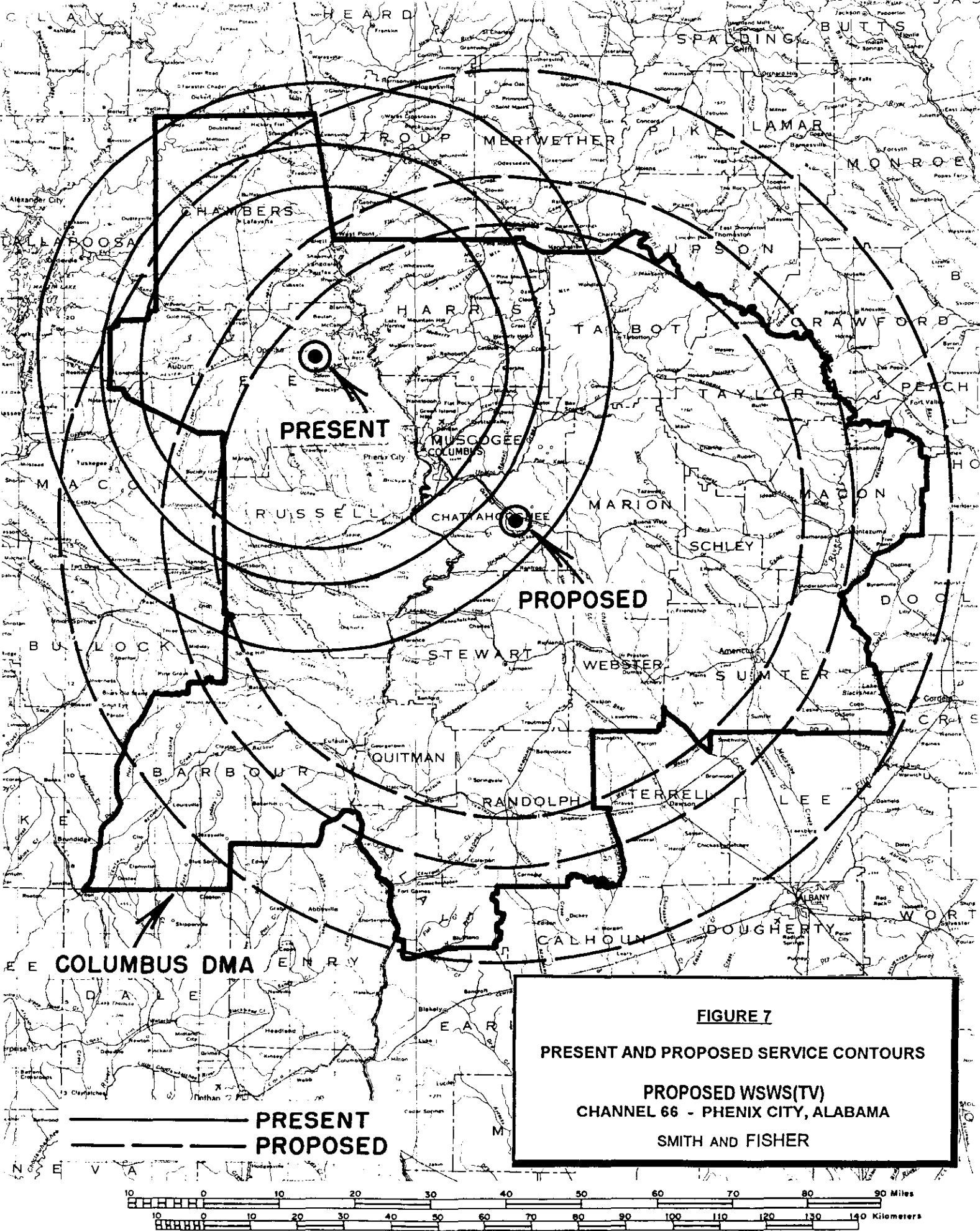
FIGURE 5
Page 2

<u>Map Number</u>	<u>Call</u>	<u>Community</u>	<u>Channel</u>
24	WUPA	Atlanta, GA	69
25	WDCO-TV	Cochran, GA	29
26	WMAZ-TV	Macon, GA	13
27	WGXA	Macon, GA	24
28	WMGT	Macon, GA	41
29	WGNM	Macon, GA	64
30	WPGA-TV	Perry, GA	58
31	WGTV	Athens, GA	8
32	WALB-TV	Albany, GA	10
33	WFXL	Albany, GA	31
34	WSST-TV	Cordele, GA	55
35	WACS-TV	Dawson, GA	25
36	WABW-TV	Pelham, GA	14
37	WCTV	Thomasville, GA	6

FIGURE 6

POPULATION AND AREA DATA
PROPOSED WSWS(TV)
CHANNEL 66 - PHENIX CITY, ALABAMA

	<u>Population</u>	<u>Area (Sq. Km.)</u>
Present Grade B Contour	484,789	11,665
Proposed Grade B Contour	688,702	28,817
Common Area	466,067	10,306
Loss Area	18,722	1,359
Gain Area	222,635	18,511
Loss Area With 4 Other Services	14,228	11,298
Gain Area With 4 Other Services	8,475	349



APPENDIX B

DECLARATION OF GERALD KING POTTER

1. My name is Gerald King Potter. I am the General Manager and the General Sales Manager for Television Broadcast Station WSWs (TV), analog Channel 66 in Opelika, Alabama, which is licensed by the Federal Communications Commission (the "FCC") to, and owned and operated by, Pappas Telecasting of Opelika, a California Limited Partnership ("Pappas Telecasting").

2. I have reviewed the foregoing Petition for Rule Making, to be filed with the FCC on Pappas Telecasting's behalf. Except for those matters of which official notice may be taken or for which citations are provided to published sources, and except for the matters addressed in Appendix A to the Petition for Rule Making (the Engineering Statement of Neil M. Smith of Smith and Fisher in Washington, D.C., Pappas Telecasting's consulting broadcast engineer), the statements of fact contained in the Petition for Rule Making with respect to WSWs (TV) and with respect to the communities of Opelika and Phenix City, Alabama and Columbus, Georgia are true and correct to the best of my personal knowledge, information and belief.

3. I declare under penalty of perjury that the foregoing is true and correct. Executed this 2nd day of September, 1999.


Gerald King Potter